Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

August 18, 2004

GSBCA 16405-TRAV

In the Matter of JORGE A. PAGAN-ALBINO

Jorge A. Pagan-Albino, Hato Rey, PR, Claimant.

Joe Lazar, Associate General Counsel, United States Marshals Service, Washington, DC, appearing for Department of Justice.

NEILL, Board Judge.

An employee assigned to a post of duty outside the continental United States (CONUS) and sent back to CONUS on home leave is not entitled to per diem for the entire duration of that leave.

Background

Claimant in this case, Mr. Jorge A. Pagan-Albino, is a senior inspector assigned to the United States Marshals Service in San Juan, Puerto Rico. In June 2003, Mr. Pagan-Albino and his family returned to CONUS for home leave. The estimated costs shown on his travel authorization included a per diem allowance of $258. At the time of his departure for CONUS, Mr. Pagan-Albino believed that, in accordance with agency practice in effect at the time, he would be reimbursed for lodging, meals, and incidental expenses for each day of his home leave.

Upon return from his home leave, Mr. Pagan-Albino submitted a voucher seeking transportation costs and per diem for each day of his home leave. The agency reimbursed Mr. Pagan-Albino for his transportation costs but denied all claims for per diem.

In accordance with agency grievance procedures, claimant filed a grievance, contending that the per diem amount shown on his travel authorization was a daily rate applicable to each day of his home leave. In responding to this grievance, the designated grievance officer confirmed that, at the time Mr. Pagan-Albino departed for his home leave, it was the practice of the agency to pay a daily per diem allowance to employees on home leave. While claimant was on leave, however, agency management suspended the practice on the ground that it was not in accordance with applicable statute and regulation. For this reason, all of Mr. Pagan-Albino's claims for per diem had been denied.

The grievance officer did find, however, that the agency's total denial of any claim for per diem was an error. He pointed out that, under the Federal Travel Regulation (FTR), an employee returning to CONUS on home leave is entitled to per diem for the duration of his or her travel both from and back to the post of duty. Accordingly, Mr. Pagan-Albino was invited to resubmit his claim for per diem. The resubmitted claim sought payment of $3075.95. The agency authorized payment of $209.

Mr. Pagan-Albino contends that he is entitled to payment of the entire $3075.95. He asks that we review the agency's decision to pay only a small portion of this claim.

Discussion

By statute, an agency is authorized to pay the expenses of round-trip vacation travel for an employee and the transportation of his immediate family from his or her post of duty outside CONUS to the place of his actual residence at the time of appointment or transfer to the post of duty after the employee has satisfactorily completed an agreed period of service and prior to the start of another tour of duty. 5 U.S.C. § 5728(a) (2000). While the statute limits payment of costs incurred by the employee's family to transportation costs, it does not impose the same limitation on the employee. The employee, therefore, can be reimbursed for other costs as well. The regulations implementing this statute confirm this by providing that the employee, but not his or her family, is entitled to en route per diem as well. 41 CFR 302-3.101 tbl. F (2003). Neither the statute nor the implementing regulations, however, make any provision for the payment of a per diem allowance to the employee while residing in CONUS on home leave.

Mr. Pagan-Albino has cited for us no authority which might justify the continual payment of such an allowance for the duration of an employee's home leave. We know of none ourselves and would not expect such authorization to exist. An employee on home leave is not on temporary duty conducting official government business away from his or her post of duty. Rather, the employee is on vacation and presumably ready to respond personally for any living costs associated with this period of leave.

Claimant's principal argument in defense of his claim is the agency's past practice of paying its employees a per diem while they were on home leave. He explains that, while on leave, he incurred costs in reasonable reliance on the agency's practice. He is understandably frustrated by the agency's abrupt suspension of the practice without any forewarning.

Unfortunately for claimant, it is well established that the Government may not authorize the payment of money if not in accordance with statute and regulation. Kevin S. Foster, GSBCA 13639-RELO, 97-1 BCA ¶ 28,688 (1996) (citing Office of Personnel Management v. Richmond, 496 U.S. 414 (1990); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)). Payment to Mr. Pagan-Albino, therefore, in the absence of proper authorization, cannot be justified solely by the fact that he may have relied in good faith and to his detriment on a prior practice of the agency subsequently determined to be unauthorized. While it may seem grossly unfair that the claimant and others cannot be paid under these circumstances, it must be recognized that the overriding concern in cases such as this is the protection of the taxpayers' interest in not having unlawful disbursements made from public funds. See William T. Orders, GSBCA 16095, 03-2 BCA ¶ 32,389; Barry McGuire, GSBCA 15346-RELO, 01-1 BCA ¶ 31,343; Patricia A. Tobin, GSBCA 14483-RELO, 98-1 BCA ¶ 29,663.

Parties appealing to this Board to settle relocation or travel claims bear the burden of demonstrating to us why a particular claim should be paid. Board Rule 401(c) (48 CFR 6104.1(c) (2003)); Ronald J. Anson, GSBCA 15708-TRAV, 02-1 BCA ¶ 31,819; Barbara M. Singleton, GSBCA 15456-RELO, 01-2 BCA ¶ 31,634; Anthony A. Acerra,

GSBCA 15297-RELO, 00-2 BCA ¶ 31,051; Thomas W. Burt, GSBCA 14537-RELO, 98-2 BCA ¶ 29,751; Michael S. Knezevich, GSBCA 14398-TRAV, 98-1 BCA ¶ 29,607. If Mr. Pagan-Albino cannot direct us to a statutory or regulatory authority justifying payment of an employee's subsistence expenses while on home leave, then he clearly cannot meet this burden. We, therefore, have no choice. His claim must be denied.

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EDWIN B. NEILL
Board Judge